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No. 319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, MALCOLM WILSON, Lieutenant Governor of the State of New York, and ANSLEY BORKOWSKI, Clerk of the Assembly of the Legislature of the State of New York, *Appellants,*

v.

JEROME T. ORANS, THE VILLAGE INDEPENDENT DEMOCRATS, CAROL GREITZER, EDWARD I. KOCH, MARTIN BERGER and LORRAINE RICHMAN, *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Appellee Orans moves the Court to dismiss the appeal on the ground that it presents no substantial Federal question.

As demonstrated in our Jurisdictional Statement, the decision of the New York Court of Appeals clearly presents substantial Federal questions. The decision rests squarely on the determination of a Federal constitutional question, based on an interpretation of a decision of this Court, and the Court of Appeals itself so stated. The State

Court of Appeals held that the provision of the New York Constitution (Article III, Section 2) fixing the size of the Assembly at 150 members continued in full force and effect under the Fourteenth Amendment and this Court's decision in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964). The State Court of Appeals itself stated the question before it to be:

> "are any of the provisions of article III of our State Constitution, in addtion to those directly passed on by the Federal courts in the *WMCA* case, in 'unavoidable conflict with the Fourteenth Amendment' (equal protection clause) of the Federal Constitution?" Jurisdictional Statement, Appendix A, p. 8a.[1]

1. Appellee's motion asserts (p. 5) that an Assembly of 150 members can be apportioned in compliance with the Equal Protection Clause, and that a contrary assertion is "frivolous". Whether or not such a contention would be frivolous is beside the point since it is not at issue on this appeal. We have not contended, as Appellee suggests, that 150 Assemblymen cannot be constitutionally apportioned. What we have contended is that this Court's *WMCA* decision invalidated New York's prior apportionment

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[1]Appellee's motion (p. 3) asserts that the decision of the New York Supreme Court (*In the Matter of Orans*, 45 Misc. 2d 616, 257 N. Y. S. 2d 839), which was affirmed by the judgment of the New York Court of Appeals here on appeal, "found" or "held" that a *prima facie* showing of invalidity had been made with respect to certain provisions of the New York reapportionment plans other than the size of the Assembly. All that the New York Supreme Court said as to certain of these provisions was that an issue of fact was presented. Moreover, the Court of Appeals stated that these matters were "treated in the court's opinion" but were not "real holdings" by the New York Supreme Court (Jurisdictional Statement, Appendix A, p. 2a). In any event, the decision of the New York Court of Appeals here on appeal was expressly confined to the validity of the 150-member requirement, and other matters discussed in the opinion of the New York Supreme Court are in no way involved here.

scheme, which included the 150-member provision. This Court held in *WMCA* that New York's apportionment scheme, which provided for both separate county representation and the limitation on the size of the assembly, could not, given the population pattern in New York, result in a constitutional apportionment. The Court found this scheme, including the 150-member Assembly provision, to be violative of the Fourteenth Amendment.

The involvement of the 150-member Assembly provision in this Court's holding of unconstitutionality is clear. The Court in *WMCA* expressly pointed out that the defect in New York's prior apportionment scheme was that it combined a limitation on the size of the Assembly with a provision for separate county representation. The Court stated:

> "*With the size of the Assembly fixed at 150,* with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population, and with an additional seat given to counties having 1½ population ratios, the population-variance ratios between the more populous and the less populous counties will continually increase so long as population growth proceeds at a disparate rate in various areas of the State. . . . [W]hen the effect of *these provisions,* and the statutes implementing them, on the right to vote of those individuals living in the disfavored areas of the State is considered, we conclude that neither the existing scheme nor the forthcoming one [apportionment under the 1960 census] can be constitutionally condoned." 377 U. S. at 654. (Emphasis supplied.)

Appellee's motion does not come to grips with this clear holding in *WMCA*. The motion, referring to this quotation from the Court's opinion, states: "What this Court

was considering was the *effect* of the scheme of apportionment embodied in the New York Constitution" (emphasis supplied). This is precisely the argument unsuccessfully advanced by Appellants to the New York Court of Appeals. Appellants there argued that *WMCA* invalidated the prior apportionment scheme in its entirety, because of the effect, ***in combination,*** of the provisions for separate county representation and a 150-member Assembly. Yet this argument, which Appellee now appears to concede, was rejected by the Court of Appeals. The Court of Appeals instead interpreted this Court's *WMCA* decision as striking down *only* the provision of the apportionment scheme providing for separate county representation, and as not affecting the continuing validity of the 150-member provision. Jurisdictional Statement, Appendix A, p. 7a.

Appellee's motion asserts (p. 7) that: "This Court no more condemned the fixed number of 150 Assemblymen than it condemned the 'disparate rate' of population growth in various parts of New York." It is equally true that the Court no more condemned the provision for separate county representation in the State Constitution than it condemned the provision fixing the size of the Assembly. Just as 150 Assemblymen can be constitutionally apportioned, separate county representation can be achieved in compliance with the Equal Protection Clause by means of fractional voting. This is what the New York Legislature sought to do in certain of the reapportionment plans enacted subsequent to the *WMCA* decision. The validity of fractional voting in the New York reapportionment plans is now on appeal to this Court. *Lomenzo* v. *WMCA,* October Term, 1965, No. 85.

2. Appellee asserts (pp. 7-8) that even if the *WMCA* decision did hold the 150-member requirement to be a part of the unconstitutional apportionment scheme, it is never-

theless a matter for State law, rather than a Federal question, as to whether that requirement continues in force. It appears to be Appellee's position that even if the New York Court of Appeals misconstrued the holding of this Court in *WMCA,* no Federal question is presented because of the possibility that the State court might reach the same result in the application of State rules of severability, i.e., that it might hold as a matter of State law that the State constitutional provision as to separate county representation must yield to the provision as to the size of the Assembly.[2]

Appellee's argument misconceives the principles governing this Court's review of State court decisions. So long as the State court erroneously interpreted the decision of this Court in *WMCA,* which interpretation was dispositive in the decision of the State court, a Federal question is clearly presented, irrespective of what the State court might or might not do under State law in the event its error is corrected. A correction by this Court of the State court's erroneous determination of a Federal question is a necessary preliminary to any application of State law by the State court.

This Court has made it clear that where a State court bases its decision on Federal grounds the appellate jurisdiction of this Court is not eliminated by the possibility that the

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[2]The suggestion that the New York Court of Appeals might reach the same result in the application of State principles of severability has little rational basis. Counties are peculiarly important in New York as political and governmental units, and separate county representation is an historic State policy (see Jurisdictional Statement in *Lomenzo* v. *WMCA,* October Term, 1965, No. 85 at 15-17). The size of the Assembly, on the other hand, has little independent significance. Moreover, the Court of Appeals regarded the State law issue to be that of severability on the erroneous assumption that only the separate county representation provision had been invalidated by this Court. Had the Court of Appeals correctly interpreted the *WMCA* decision, a different State law issue might have been presented.

State court might reach the same result through the application of State law once it is disabused of its erroneous interpretation of Federal law. *E.g. Standard Oil Co. of California* v. *Johnson,* 316 U. S. 481 (1942); *State Tax Commission* v. *Van Cott,* 306 U. S. 511 (1939).

3. Finally, Appellee's motion mistakenly asserts (p. 9) that we contend "that the Federal Constitution prohibits judicial review in the New York State Court of any legislation . . . to deal with the situation produced by a determination that an existing scheme of state apportionment is unconstitutional." We, of course, take no such position. On the contrary, the Jurisdictional Statement makes evident that there is nothing improper in State court review of reapportionment legislation. The point there made relates solely to the *standard* which State courts may properly apply in judging legislation enacted to comply with Federal court orders. It would improperly impede compliance with Federal court reapportionment orders if, as here, State courts were permitted to resurrect remnants of an invalid apportionment scheme in order to strike down the action of state legislatures in the fulfillment of their reapportionment obligations. Rational reapportionment requires that State legislatures be permitted to carry out responsibilities defined by the Federal courts, free of restrictions contained in previously invalidated apportionment schemes.[3] This is especially true where, as here, the legislation involved is a stop-gap reapportionment designed to remedy malapportionment on a temporary basis until a permanent plan can be adopted by State constitutional amendment.

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[3]The Jurisdictional Statement (pp. 15-16) notes that if State courts were permitted to use remnants of invalidated apportionment schemes to strike down reapportionment legislation enacted in compliance with Federal court orders, a head-on collision between State and Federal courts would be invited. Just such a collision occurred here. In the present case the State court invalidated Plan A of the

CONCLUSION

The decision of the New York Court of Appeals was squarely and expressly based on the determination of a substantial Federal question.

Probable jurisdiction should be noted.

Respectfully submitted,

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New York Reapportionment Compliance Act as violating the 150-member limitation on the size of the Assembly. On May 24, 1965 the District Court, faced with State court invalidation of the only Plan held to comply with the Federal Constitution, ordered that a 1965 election be held under Plan A as a stop-gap measure. Subsequent to the filing of our Jurisdictional Statement, the New York Court of Appeals, in an order dated July 9, 1965, enjoined the holding of a 1965 election on the basis of Plan A. A direct confrontation between State and Federal courts was thus presented. On July 13, 1965 the District Court enjoined all persons "from interfering with the carrying out and execution by any and all New York State officers of the order of this Court dated May 24, 1965." A stay of the District Court's May 24, 1965 order was denied by this Court on June 1, 1965. A stay of the District Court's July 13, 1965 order was denied by Mr. Justice Harlan on July 16, 1965.